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SUBJECT: MARCH 2009 OECD WORKING GROUP ON BRIBERY MEETING

¶1. (SBU) U.S. delegation (USDEL) members from the Commerce, Justice, and State Departments and the Securities and Exchange Commission (SEC) participated in the OECD Working Group on Bribery (WGB) meeting in Paris March 16-20, 2009. The WGB made significant progress on its Review of Instruments, with the USDEL successfully conveying its view that amendments to the existing instruments, as well as new binding instruments, were unnecessary and that new issues and clarifications would be best advanced through a new recommendation. The WGB also began discussions on a proposal to review the WGB Management Group's role and procedures. In addition, the WGB negotiated a rough draft for inclusion in the OECD Ministers' June 2009 statement on the importance of fighting bribery, respecting Article 5, and rigorous monitoring of the OECD Anti-Bribery Convention (&Convention8) during the global economic crisis. Members of the delegation also participated in a WGB public consultation with the private sector on internal controls and external auditors.

¶2. (SBU) The WGB examined new signatory Israel's Convention implementing legislation and overall legal framework for addressing bribery of foreign public officials, giving it a fairly positive review. The U.K. delivered a status report on its anti-bribery legislation, which it said is on track for public release and &pre-legislative scrutiny8 by Easter (April 12). The Czech Republic provided an update on its progress in finally adopting corporate liability, estimated for 2010, which the WGB found unacceptable. During the Tour de Table information exchange on Parties, current investigation and cases, delegates discussed pending French legislation that would make investigations of defense companies more difficult and that may be in response to the UK's termination of its BAE investigation; at the Chair's request, France pledged to provide a written report within a month and to follow up at the June WGB meeting. USDEL and Switzerland also proposed modifying the Tour de Table exercise to focus on specific

companies/industry sectors and a subset of parties at each WGB meeting, which the WGB will consider. USDEL met with several countries on the margins of the meeting, including China, currently a WGB observer, on its views of the Convention and next steps, and like-minded Parties Canada and New Zealand on the issue of facilitating payments. Although a Russian delegation briefly appeared as an observer at the beginning of the meeting, it left before USDEL could meet with them and made no presentation or remarks. On the margins of the meeting, USDEL also participated in discussions concerning a new WGB Chair.

13. (U) USDEL members were Kathryn Nickerson (DOC), Mark Mendelsohn and Charles Duross (DOJ), Troy Beatty (SEC) and Greg Wierzynski (DOS). End Summary.

OECD WGB BACKGROUND

14. (SBU) Since the adoption of the Foreign Corrupt Practices Act (FCPA) in 1977, the U.S. has vigorously enforced criminal and civil penalties against U.S. individuals and companies involved in the bribery of foreign public officials. In response to concerns that American companies were operating at a disadvantage compared to foreign companies that routinely paid bribes, the U.S. led negotiations that, in 1997, resulted in the signing of the OECD Anti-Bribery Convention. The Convention is intended to level the playing field for U.S. exporters by committing our main trading partners to adopt laws criminalizing the bribery of foreign public officials. Now including all thirty OECD members plus Argentina, Brazil, Bulgaria, Chile, Estonia, Slovenia, South Africa, and Israel, the Convention is potentially a powerful tool against corruption. The OECD WGB conducts regular peer review of countries, legal frameworks and enforcement. Although U.S. enforcement is stronger than ever, our trading partners, enforcement record has been mixed, with most countries having few investigations and prosecutions, if any. The WGB is currently developing a permanent peer monitoring mechanism for the Convention.

REVIEW OF INSTRUMENTS

15. (SBU) The WGB continued and made significant progress on its Review of Instruments exercise, begun in 2007 (ten years after Convention adoption). The purpose of the review is to determine whether the WGB needs to amend, clarify or issue guidance on its instruments, i.e., the OECD Anti-Bribery Convention, its Commentaries and the 1997 Revised Recommendation of the Council on Combating Bribery in International Business Transactions. USDEL sought to ensure that the WGB did not pursue amending the existing instruments or issuing binding obligations (including authoritative interpretations), which USDEL deems unnecessary and would likely require Senate consultations. Instead, the U.S. supported a new non-binding recommendation, which would have to be approved by the OECD Council but would not require U.S. Senate approval. The broader WGB, which did not advance proposals for new instruments or amendments, appeared to support this view.

16. (U) The WGB (with some USDEL support) continued to consider language on reporting bribery by public officials, effective whistleblower protections, internal company controls, UN Convention Against Corruption (UNCAC) ratification, mutual legal assistance, and corporate liability. The WGB threw out several issues that did not merit revision or clarification, including the treatment of bribes from the private sector to the private sector (which is beyond the scope of the Convention) and bribes paid to third parties on behalf of foreign public officials or paid through intermediaries (as such bribes are already explicitly covered by the Convention). Four specific issues related to the Review of Instruments (tax deductibility of bribes to foreign public officials, Article 5, facilitation payments and corporate liability) are discussed in more detail in paragraphs below.

17. (SBU) Review of the 1996 joint Recommendation on Tax

Deductibility of Bribes of Foreign Public Officials (which is incorporated into the 1997 Revised Recommendation on Combating Bribery in International Business Transactions): A representative from the WGB,s sister Committee on Fiscal Affairs (CFA) presented a new draft Recommendation on Tax Measures for Further Combating Bribery of Foreign Public Officials in International Business Transactions that was approved by the CFA on January 27, 2009. The new draft recommends in Part I that Member countries and other Parties to the OECD Anti-Bribery Convention explicitly disallow tax deductions for bribes to foreign public officials, that they review their frameworks for disallowing such payments, and that they consider including in their bilateral tax treaties language to allow tax authorities to share tax information with other law enforcement agencies and judicial authorities on high priority matters (e.g. to combat money laundering, corruption, and terrorism financing). The WGB was satisfied with the bribery text relating to tax deductions in Part I of the draft Recommendation. However, several countries, i.e.

Canada, New Zealand, and Switzerland, took issue with Part II of the new Recommendation. Part II recommends establishing an effective legal and administrative framework and providing guidance to facilitate tax authorities, reporting on suspicions of serious crimes (foreign bribery, money laundering, and terrorism financing) to the appropriate domestic law enforcement authorities. As a result, the Chair suggested that the CFA either limit Part II,s scope to bribery or change the title of the new draft. USDEL had no comments, as it has been coordinating with the Treasury Department on the new Recommendation (Treasury has the lead on this issue and represents the USG in the CFA). (Note: earlier versions of the new draft Recommendation had included provisions on disallowing tax deductions for facilitating payments, e.g. generally small payments to public officials that are not considered bribes under the FCPA. In earlier meetings, USDEL and several other delegations (in both committees) objected to the language, as such payments were legal under their systems, so the language on facilitating payments was omitted in the final draft. However, the new Recommendation will likely be re-reviewed in three years from its adoption, so the issue of facilitating payments deductions will likely reappear. End note.)

18. (SBU) Article 5: Of particular concern to the U.S. was an overly prescriptive Secretariat proposal on Article 5 of the Convention (which prohibits parties from considering issues of national economic interest, effects on relations with other States or the identity of the legal or natural persons involved when exercising discretion to investigate or prosecute). The Secretariat,s proposal set forth a new set of required procedural &safeguards8 to ensure that decisions not to investigate or prosecute are consistent with Article 5. Many delegates objected to language stating that such decisions would be &fully reviewable8 by the WGB. USDEL strongly opposed the Secretariat proposal, as it exceeded the scope of both the Convention and Commentaries, including Article 12. USDEL suggested instead that OECD make a political statement in support of Article 5 in a Council recommendation. With the support of several other delegations, the legal advisor to the OECD took on the USDEL political statement suggestion and prepared a Ministerial declaration discussion draft expressing renewed support for the Convention in the context of the global economic crisis and calling for diligence in monitoring and enforcement without regard for the prohibited considerations in Article 15. The draft also contains a paragraph calling for accession by remaining large exporters outside of the group (China and Russia).

19. (SBU) Article 5 continued: USDEL believes such a Declaration would serve to (1) reinforce the Convention,s importance during the economic crisis; (2) support the WGB and continued systematic monitoring, including the WGB,s determination, as part of monitoring, to address on a case-by-case basis situations like the UK,s decision to discontinue its BAE Al Yamamah investigation (without any express reference to the UK or that case); (3) address civil

society,s concerns regarding Article 5 enforcement; and (4) send a strong signal to China and Russia to join the Convention. The WGB will continue to work on the draft to ready it for consideration at the June OECD Ministerial. The United States should strongly support a OECD Ministerial declaration that emphasizes rigorous monitoring, Article 5 obligations, and the accession of new Parties (i.e. China and Russia). Linking the objectives of the OECD Anti-Bribery Convention to multilateral cooperation on the global economic crisis could send a powerful message about the need for anti-bribery enforcement.

¶10. (SBU) Facilitation Payments: Despite the Chair's proposal to remove the Commentary to the Convention that allowed for a facilitation payment exception, USDEL convinced the WGB that it needed to study the issue more closely to provide the clarity the business community is seeking. At USDEL's request, the Secretariat will circulate proposed U.S. questions on how the issue of facilitation payments is handled by countries without the exception, for example through the use of prosecutorial discretion. The WGB agreed to separate this issue from the Review of Instruments to allow more time, perhaps until October, to develop guidance or recommendations. The WGB will hold an internal meeting June 15 to further review the matter; the Swedish delegation will head the ad hoc group drafting the agenda, and private sector consultation remains a possibility. In the meantime, countries that provide for the exception will discreetly reach out to their private sectors to determine best practices. Possible outcomes include WGB guidance to prosecutors, investigators, and the private sector, and forward-looking language in a new recommendation. USDEL met with allies (Canada and New Zealand) over a working lunch on the issue to solidify support (other allies, such as, Australia did not attend WGB meeting, while Korea sent its OECD mission representative).

¶11. (U) Phase 3: The WGB continued to refine a document setting forth procedures for its next, permanent phase of monitoring. The WGB agreed to decouple the issue from the Review of Instruments, another USDEL goal, as we have sought to begin the new stage of monitoring as soon as possible. Delegations will provide comments to the Secretariat,s proposed Phase 3 questionnaire to be completed by June.

MANAGEMENT GROUP (MG) REVIEW

¶12. (SBU) The MG was created in 2004 to improve WGB efficiency and to engage the Secretariat; the U.S. has been a member of the MG since its inception. At its December meeting, the WGB decided to review the MG,s role and procedures. USDEL,s overall goal is to maintain a small bureau-like MG that will assist in steering the WGB agenda and provide guidance to the WGB and Chair. USDEL is working to ensure that MG,s role remains procedural and does not replace the substantive role of the WGB, even if a substantive role would sometimes be more convenient for the Secretariat. Currently the MG has eight elected members: an independent Chair, a Vice-Chair (Greece) and heads-of-delegation from France, Sweden, Italy, Germany, Japan and the United States. In detailed comments to the Secretariat,s draft proposals, USDEL advocated for better future regional balance and allowing for MG representation by delegation alternates when necessary, in light of State,s rotation process (State normally represents the USDEL in the MG). The WGB discussion generally echoed these points, and the MG said it would discuss the proposals in more detail at its next meeting, taking the WGB,s views into account, and provide a revised draft for the WGB in June.

INTERNAL CONTROLS AND AUDITING SEMINAR

¶13. (U) Troy Beatty from the SEC served as a facilitator and Kathryn Nickerson from DOC represented the USDEL at a public consultation with the private sector on internal controls and external auditing. The private sector provided advice on these issues and commented on whether revision to the 1997 Recommendation is warranted. (Section V of the 1997

Recommendation requires member countries to consider adopting appropriate internal controls and external auditing standards.) The private sector enthusiastically provided advice on the elements of an effective compliance and ethics program, which participants said must include a strong management component, continuous internal training, direct reporting channels to management, whistleblower protection, and sufficient internal review structures. Seminar participants agreed that while basic requirements of such programs should be the same, regardless of the size of the company, big corporations should have more elaborate programs whereas smaller companies should have programs more appropriate to their size. Furthermore, such programs should extend to companies, subcontractors and subsidiaries. Participants stressed the importance of government guidance and incentives, such as providing information on the amount of corruption risk in particular foreign markets. They also suggested that governments) prosecutors in particular) consider a company,s anti-bribery compliance program and whether the program would constitute a mitigating factor in prosecution or sentencing. Concerning external audits, the private sector explained that strong internal compliance measures would facilitate external auditors, work. There was a long discussion on whether external auditors should report all instances of foreign bribery to company management, irrespective of materiality (as that term relates to financial statement reporting). There was agreement, if such reporting was required or allowed, that some kind of safe harbor provisions (protecting auditors from liability, i.e., civil lawsuits) would be needed. The WGB provided comments on the private sector,s proposals, and the Secretariat was tasked with incorporating them into proposed language for a potential new recommendation for discussion at the June meeting.

ISRAEL PHASE 1 REVIEW

¶14. (SBU) Israel, the 38th party to the OECD Antibribery Convention, underwent its Phase 1 Review in which the WGB examined Israel,s law implementing the Convention and overall legal framework for addressing bribery of foreign public officials. The WGB found that Israel,s law generally met the standards of the Convention, with only a few problems that would be addressed during Israel,s Phase 2 review (in which examiners and the Secretariat will visit Israel to examine its enforcement structure and resources). For example, although the penalties for foreign bribery were more or less the same as those for domestic bribery under Israeli law, as required by the Convention, the WGB questioned whether 3.5 years imprisonment and 38,000 euro fines were effective, proportionate and dissuasive, especially for corporations, as required by Article 3 (Sanctions) of the Convention. The WGB also expressed concerns about whether the requirement under Israeli law that the Attorney General approve foreign bribery indictments presented any concerns under Article 5 on enforcement, which provides that Parties cannot take into account economic considerations, relationships with another State, or the identity of the specific legal or natural person involved when deciding whether to investigate or prosecute. Both the lead examiners, Canada and Switzerland, and Israeli representatives were extremely well prepared. The review was an excellent example of Phase 1 monitoring for the observing Chinese delegation.

UK DRAFT LEGISLATION

¶15. (SBU) The U.K. delegate provided a report on the U.K.,s progress in fulfilling its Phase 2 bis legislative recommendations, as it currently lacks an adequate anti-bribery law that meets the Convention,s standards. The U.K. plans to publish a draft bribery bill for pre-legislative scrutiny this Parliamentary session before April 12 and claims that officials &are firmly on track8 to meet this goal. The U.K. said that it appreciated the OECD expert delegation,s visit in January on behalf of the WGB, composed of representatives from the Secretariat and the MG (Mark Mendelsohn, DOJ, represented the USG). The U.K.

reported that it had taken note of the delegation's advice, particularly concerning the U.K. Law Commission proposal for a corporate offense of negligent failure to prevent bribery. The U.K. said that it is mindful of the constraints posed by its electoral cycle, requiring a national Parliamentary election by May 2010 at the latest,⁸ and shares the WGB concern about the need to make substantial progress in reform in 2009. On the meeting margins, the U.K. delegation expressed optimism that the draft bribery bill would progress on schedule and that Parliamentary time would be afforded for legislation consideration. The WGB needs to maintain pressure on the U.K. to move toward an adequate anti-bribery law. USDEL asks Embassy London to flag appropriate opportunities to convey to U.K. officials -- especially those at a high level -- the importance of timely reforms.

CZECH IMPLEMENTATION

¶16. (SBU) The Czech delegate reported on Czech efforts to establish corporate liability for foreign bribery. He reported that the Czech Government will likely adopt a resolution on March 30, 2009 to prepare a draft law on criminal corporate liability for discussion by June 2010. He said that the Government may consider an alternative option, namely, preparing a policy paper on administrative corporate liability by April 30, 2009. The WGB found this report and timetable unacceptable, as it had been recommending that the Czech Republic, an original signatory to the Convention, adopt corporate liability for years. The WGB agreed that the Chair would send two letters, on the WGB's behalf, to the Czech Prime Minister expressing the WGB's serious concerns and asking that the Czech Ambassador to the OECD attend the next WGB meeting to report to the group. The WGB Chair had already sent one letter to the Prime Minister in December, but had not received a reply at the time of the March meeting.

PROBLEMATIC PROPOSED FRENCH LEGISLATION

¶17. (SBU) During the Tour de Table, when the WGB discussed press reports of potential cases, the USDEL raised press reports that France apparently has a new bill that would limit investigating magistrates, power to conduct searches of defense contractors, offices or other locations likely to have classified or state secret material related to defense contracts. The U.K. joined the USDEL in expressing serious concern over this development. The Chair demanded a report from France within a month. After first denying that the bill was public and stressing that the bill was in a preliminary state, France said after the lunch break that such a bill had in fact been introduced in Parliamentary committee in October, that the legislation had been proposed by the Defense Ministry, and promised to deliver a written report as requested. This not only raises serious Article 5 concerns, but may represent France's response to the UK's discontinuance of its BAE Al Yamamah case and threaten chances for the Ministerial Declaration described above (para 8 and 9). When confronted, France denied that the draft bill was related to the U.K. situation, explaining that the legislation had been prepared some time ago. The USDEL is deeply concerned that such legislation could undermine bilateral cooperation on anti-bribery and France's ability to fulfill its OECD Anti-Bribery Convention obligations and asks Embassy Paris to obtain more information from the French about the proposed legislation that would shield the defense industry from investigations.

OECD ACCESSION COUNTRIES CHILE, ESTONIA, AND SLOVENIA;
POTENTIAL CONVENTION OBSERVERS THAILAND, EGYPT, AND INDIA

¶18. (SBU) Chile, Estonia and Slovenia (all parties to the Anti-Bribery Convention) are seeking OECD accession, so the WGB must provide the OECD with an opinion on whether they are fulfilling their anti-corruption obligations. Chile has made significant progress on a bill creating corporate liability, which will hopefully pass this year, greatly improving Chile's chances for a favorable opinion from the group. The WGB agreed on draft contents of a letter the Chair will send

to Chile to encourage it to pass such legislation and note other deficiencies it must address. The Secretariat will draft new reports for Estonia and Slovenia, which appear to be on track. The WGB will review the reports in June.

¶19. (SBU) Concerning Thailand's observer request, the Chair asked the Secretariat to confirm that the Thai government is interested, as the request came from Thailand's Office of the National Anti-Corruption Commission (NACC), which is apparently separate from the government. USDEL said that NACC will be meeting with delegation representatives in April and will ask about its relationship with the Thai government. The Secretariat has sent accession information to Egypt in response to initial interest about observing with a view to becoming a party to the Convention but has not received any further expression of interest. The Secretariat separately told the MG that it is pursuing India, but that India has not responded to its inquiries and does not appear interested in joining the Convention.

CURRENT CONVENTION OBSERVERS: CHINA AND RUSSIA

¶20. (SBU) USDEL held a brief informal bilateral meeting with China, which was attending as an observer for the third time.

USDEL stressed the importance of having a foreign anti-bribery law and offered continued bilateral assistance in this area. The Chinese did not make a presentation or offer any update on the status of their law, saying, when asked, that they had nothing to add to the detailed presentation they made in December. The Chinese delegate said that China attracts and is making a lot of foreign investments and so is concerned about foreign corruption, including corruption of its domestic officials by foreign companies. He admitted that Chinese companies risked being known as corrupt abroad if China did not enact a foreign bribery law soon. The Chinese delegates stressed their continued goal of addressing domestic bribery and implementing UNCAC. USDEL believes continued engagement with China on anti-bribery issues is necessary to determine Chinese attitudes on domestic legislation against foreign bribery and WGB membership, and asks Chinese posts and Washington-based China offices to flag opportunities for bilateral exchange with the Ministry of Supervision or other appropriate Ministries.

¶21. (SBU) Disappointingly, the Russians only made brief appearances the first day and a half, and then did not attend the rest of the week. USDEL therefore did not have the opportunity to talk to them. The Secretariat informed USDEL during the MG meeting that although interested in accession to the OECD, the Russian Ministry of Justice was clearly not interested in the Convention and the Ministry of Foreign Affairs had to push them to attend at all. The Secretariat warned that assessing Russia will be challenging, given its reportedly inadequate new anti-corruption law and lack of enforcement. Nonetheless, the WGB agreed to invite Russia for its accession review in December.

NEW CHAIRMANSHIP

¶22. (SBU) Current WGB Chair Mark Pieth invited U.S. delegates Kathryn Nickerson and Mark Mendelsohn to lunch to discuss whether Pieth should remain as WGB Chair. Delegates from France and Holland also participated. All agreed that it was time to start a formal search for the next Chair, as the WGB is about to begin its new phase of monitoring and could use dynamic new leadership. Pieth has held the position for nineteen years, almost unheard of in the OECD. All also agreed that Pieth would stay for at least another year or so (the French delegate suggested until the UK had passed its anti-bribery legislation), during which time delegates would discreetly start compiling a list of potential successors. All agreed that the new chair must speak French and probably have a law degree, be capable of managing and inspiring a large group, and possess strong public relations skills. Although background on anti-corruption issues would be desirable, the caliber of a suitable candidate should be such that the new chair will be able to learn the substance

quickly. Funding the position of the new Chair will be an issue, as our understanding is that the current Chair is funded by Switzerland. USDEL will suggest adding discussion on a new WGB Chair to the next informal MG agenda (the working dinner following the formal MG meeting in June). In the meantime, USDEL members will informally seek advice on potential candidates.

CLINTON